

Decision 02-03-052 March 21, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
on an Expedited Basis for Exemption under
Section 853 for Easements on PG&E Land
Allowing Delta Energy Center, LLC to Maintain
an Electric Transition Structure for the Delta
Project and CPN Pipeline to Maintain Gas
Facilities for the Delta Project and the Los
Medanos Energy Center Project, or in the
Alternative for Approval of Easements under
Section 851. (U 39 M)

Application 01-07-031
(Filed July 26, 2001)

INTERIM DECISION APPROVING FORM OF MODIFIED EASEMENTS

A. Background

In this decision we approve the final form of the two easements that were the original subject matter of this application by Pacific Gas and Electric Company (PG&E). As noted in Decision (D.) 01-08-069, the two easements on PG&E land are needed for an underground-to-overhead electric transition structure, as well as a gas pipeline and valves, associated with a new 880 MW

electric generation plant in Pittsburg, California known as the Delta Energy Center.¹ (*Mimeo.* at 1-2.)

In D.01-08-069, we granted approval of these easements under Section 851 of the Public Utilities Code. We gave this approval reluctantly, however, because we concluded that PG&E had waited an unreasonably long time to file the application, and because it appeared that PG&E was misusing General Order (G.O.) 69-C's limited exemption of revocable licenses from Commission review as

¹ D.01-08-069 described the relation of the Delta Energy Center with PG&E's facilities as follows:

"The Delta Plant is an 880 MW combined cycle natural gas fired power plant located on a 20-acre parcel owned by Dow Chemical in Pittsburg, California. In addition to the plant itself, the [Energy Commission's] decision also addressed a new 3.3 mile 230 kv electric transmission line that interconnects the Delta Plant to the transmission grid at PG&E's existing Pittsburg substation, and a new 5.2 mile natural gas fuel supply line that connects the Delta Plant to PG&E's Line 400 in Antioch. Specific portions of these linear facilities are the subject of this proceeding.

"The electric transmission line runs both overhead and underground in its route from the Delta Plant to the Pittsburg substation. In order to connect with PG&E's facilities at the substation, the transmission line makes a transition from underground to overhead, which requires what has been described as a "Transition Structure" to be constructed on PG&E-owned land. The Transition Structure is being constructed by Delta Energy." (*Mimeo.* at 2-3.)

The 5.2 mile gas pipeline was described as follows:

"The gas pipeline connects to PG&E's Line 400 in Antioch, on what is referred to as the 'Wilbur Avenue property.' The gas pipeline supplies gas to both the Delta Plant and the already operational Los Medanos Energy Center in Pittsburg. The gas pipeline and related gas valves . . . have already been constructed on and/or under PG&E's property by CPN Pipeline Company, a subsidiary of Calpine." (*Id.* at 3-4.)

a means of allowing work to proceed on projects that require prior approval by the Commission under § 851. Nonetheless, because of the urgent need to license new power plants in California, as identified in the Governor's Executive Order D-26-01, we concluded that the § 851 approvals requested by PG&E should be granted. We also concluded, however, that a later phase of this proceeding should be held to consider whether sanctions should be imposed on PG&E for its apparent misuse of G.O. 69-C. (*Mimeo.* at 18, 22-23.)²

Although D.01-08-069 granted the requested approvals, the decision expressly reserved the right to review any changes that might be negotiated to the transition structure and gas pipeline easements. On this issue, D.01-08-069 said:

“As a practical matter, the Commission only needs to review modifications [to the easements] that alter the rights granted. However, given the context of this Application, the Commission reserves the right to determine whether any particular modification alters the rights granted, and accordingly will require all proposed modifications to be approved in advance by the Commission.” (*Id.* at 18, fn. 16.)

B. PG&E's Submission of the Revised Easements

D.01-08-069 was issued on August 23, 2001. About a month later, on September 26, 2001, PG&E submitted the final form of easement for the transition structure (as well as a related “construction license agreement”) for the Commission's review and approval.³ PG&E's pleading noted that this final form of easement had been executed by Delta Energy and PG&E shortly after the

² A prehearing conference in the sanctions phase of this proceeding, as well as in Application 01-06-043, was held on March 14, 2002.

Commission issued D.01-08-069, but had not yet been recorded because of the requirement for Commission approval of easement changes set forth in footnote 16.

PG&E argued that the changes should be approved, because all of them were beneficial to PG&E. It described the changes as follows:

“For instance, significant changes are present in Section 5, Indemnity, that delete provisions imposing indemnity obligations on PG&E. Exhibit B, subparagraph B, Commercial General Liability, has been rewritten to tighten and increase the grantee’s commercial general liability obligations, while subparagraph D adds pollution liability coverage. Another change is the addition of Section 19 to the agreement, No Offsets, limiting the grantee’s ability to claim offsets in connection with the agreement. Other changes are stylistic or provide greater clarity and specificity.” (September 26 Submission, pp. 1-2.)

PG&E concluded by noting that if the Commission “withholds approval of the Final Easement and limits its approval to the draft easement originally filed with the application, PG&E anticipates the parties would execute and record the draft easement.” (*Id.* at 2.)

On December 7, 2001, PG&E made a similar filing in connection with the final easement for the Delta Energy Center’s gas valve lot and pipeline.⁴ PG&E provided a similar description of the improvements in the final gas pipeline and valve lot easement over the draft easement attached to the application, but noted that “CPN Pipeline and PG&E have not executed the Final Easement yet.”

³ See, “Submission of Final Transition Structure Easement Agreement and Construction License Agreement,” filed September 26, 2001 (September 26 Submission).

⁴ See, “Submission of Final Gas Vale Lot and Gas Pipeline Easement,” filed December 7, 2001 (December 7 Submission).

Both the September 26 Submission and December 7 Submissions were served on the full service list for this proceeding. No protest or other pleading was filed in response to either of these submissions.

C. The Motion of Delta Energy Center and CPN Pipeline for Expedited Review of the Revised Easements

On February 13, 2002, the parties to whom PG&E was granting the easements, Delta Energy Center, LLC (Delta Energy) and CPN Pipeline Company (CPN Pipeline), filed a joint motion requesting expedited Commission review of the revised easements. Noting that the September 26 and December 7 Submissions had been pending for some time, Delta Energy and CPN argued that they were suffering harm as a result of the Commission's "unjustified and improper" delay in ruling on the modified easements:

"[T]he delay in reviewing the revised easements is needlessly harming Delta Energy and CPN Pipeline. Delta Energy intends to begin producing test power within the next two weeks and intends to be in full commercial operation before this year's summer peak season. Delta Energy and CPN Pipeline understandably have various business needs requiring the finalization of their respective easement agreements in connection with the intended operation of their facilities. The Commission's continuing delay in reviewing the revised easements is unwarranted." (Joint Motion, p. 5.)⁵

⁵ While claiming unjustified delay, the Joint Motion acknowledges elsewhere that this proceeding was reassigned to a different Administrative Law Judge (ALJ) on December 21, 2001. (*Id.* at 6, fn. 4.) Since that ALJ was on vacation from December 22 until January 3, 2002, the actual "delay" about which Delta Energy and CPN Pipeline appear to be complaining amounts to less than six weeks (*i.e.*, January 3 to February 13).

The Joint Motion also argues that a decision on the revised easements does not depend upon the outcome of the proceedings considering sanctions against PG&E, so there is no reason to delay a decision on the revised easements until those proceedings are completed. (*Id.* at 6.)

On February 14, 2002, PG&E filed a response supporting the Joint Motion. Reiterating that “the changes in the revised easements incorporate additional protections for PG&E and its ratepayers beyond the draft easements in the application,” PG&E agrees with Delta Energy and CPN Pipeline that “the remaining [sanctions] phase of this case should not affect the final easements,” and therefore urges that they be approved. (PG&E Response, p. 2.)

D. Discussion

We have reviewed the revised easements – which are set forth as Attachment 1 to the September 26 Submission and Attachment 1 to the December 7 Submission, respectively -- and we agree with PG&E, Delta Energy and CPN Pipeline that they should be approved. As the parties point out, there have been no protests to the proposed modifications, and some of the changes (especially those relating to the insurance and indemnity provisions) are much more favorable to PG&E and its ratepayers than were the original provisions.

With regard to insurance, for example, the original versions of the easements required the grantees to carry insurance for commercial general liability and “business auto” of only \$1 million for each accident or occurrence of bodily injury, property damage or personal injury, as the case might be. In the revised easements, the minimum limits for commercial general liability coverage have been increased to \$10 million for each occurrence of bodily injury, death or property damage, \$10 million for personal injury liability, \$10 million aggregate for “products and completed operations,” and \$10 million for “general

aggregate,” with defense costs to be provided as an additional benefit and not included within these dollar limits. For business auto, the limit has been increased to \$5 million per accident for bodily injury and property damage. In addition, pollution coverage of \$5 million per occurrence for bodily injury and property damage has been added. These changes are obviously more in keeping with modern liability and tort exposure than were the original provisions.

With respect to the indemnity provisions, the most striking change in both the transition structure and gas pipeline easements is that they eliminate the language by which PG&E as grantor indemnified the grantees against claims arising from the actions of PG&E, its employees, agents, etc. in and about the easement area.⁶ Under the new language in the transition structure easement,

⁶ The original indemnity language concerning PG&E’s obligations as grantor read as follows:

“Grantor shall, to the maximum extent permitted by law, indemnify, protect, defend and hold harmless Grantee, its parent corporation, subsidiary corporations, members, officers, directors, representatives, agents and employees from and against all Claims, including, but not limited to: (a) Claims for injury or death to persons arising out of or in connection with: (i) Grantor’s exercise of a right herein granted, or (ii) any act, omission or negligence of Grantor, or any of Grantor’s agents, employees, contractors, or consultants; or (b) Claims for property damage, including, without limitation, Claims that are in any way connected with the presence, suspected presence, release or spill of any material or waste that is legally regulated or is designated as a hazardous material or waste by any law or regulation of any federal, state, county or local government agency, resulting from Grantor’s use of the property subject to the easement granted herein, and including, without limiting the generality of the foregoing, Claims arising out of or in connection with: (x) Grantor’s exercise of a right herein granted, or (y) any act, omission or negligence of Grantor, or any of Grantor’s agents, employees, contractors or consultants occurring in, on or about the property subject to the easement granted herein. In the event any action or proceeding is brought against Grantee,

Footnote continued on next page

the grantees expressly waive and release PG&E, its employees, agents, etc. from such liability, except to the extent that the injury, damage or loss is brought about by the gross negligence or willful misconduct of such persons.

It seems clear that after our order in D.01-08-069, PG&E decided that it should carefully review the easements it had originally submitted and seek to improve them. The changes set forth in the attachments to the September 26 and December 7 Submissions are significant improvements over the original versions of the easements, and indicate to us that the policy judgment reflected in footnote 16 of D.01-08-069 was a sound one.

E. Waiver of Comment Period on Proposed Decision

The proceedings surrounding the modified easements set forth in the September 26 and December 7 Submissions constitute an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. Footnote 16 of D.01-08-069 required PG&E to submit for prior approval any changes that were negotiated to the easements that were considered in that decision.

its parent corporation, subsidiary corporations, members, officers, directors, representatives, agents or employees for any Claim against which Grantor is obligated to indemnify or provide a defense hereunder, Grantor upon notice from Grantee shall defend such action or proceeding at Grantor's sole expense by counsel approved by Grantee, which approval shall not be unreasonably withheld.

2. Both the modified transition structure easement included as Attachment 1 to the September 26 Submission, and the modified gas pipeline and valve lot easement included as Attachment 1 to the December 7 Submission, include numerous changes, especially to the insurance and indemnification provisions.

Conclusions of Law

1. The modifications to the transition structure easement set forth in Attachment 1 to the September 26 Submission, and the modifications to the gas pipeline and valve lot easement set forth in Attachment 1 to the December 7 Submission, are favorable to PG&E and its ratepayers.

2. The final versions of the transition structure easement and the gas pipeline and valve lot easement set forth in the September 26 and December 7 Submissions, respectively, should be approved.

INTERIM ORDER

IT IS ORDERED that:

1. The modified version of the transition structure easement set forth as Attachment 1 to the pleading entitled “Submission of Final Transition Structure Easement Agreement and Construction License Agreement,” which pleading was filed in this docket by Pacific Gas and Electric Company (PG&E) on September 26, 2001, is approved. PG&E and Delta Energy Center, LLC are authorized to record said modified easement as soon as is practicable.

2. The modified version of the gas pipeline and valve lot easement set forth as Attachment 1 to the pleading entitled “Submission of Final Gas Valve Lot and Gas Pipeline Easement,” which pleading was filed in this docket by PG&E on December 7, 2001, is approved. PG&E and CPN Pipeline Company are

authorized to execute and record said modified easement as soon as is practicable.

This order is effective today.

Dated March 21, 2002, at San Francisco, California.

LORETTA M. LYNCH
President

HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners